JUN 1 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 90

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Counsel for Appellee.

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action 712-N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A CORPORATION,

Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION; GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF ALABAMA,

Defendants

APPELLEE'S MOTION TO DISMISS OR AFFIRM AND STATEMENT AS TO JURISDICTION

Appellee, Louisville and Nashville Railroad Company, believing that the matters set forth below demonstrate the lack of substance in the questions raised by this appeal, files this its statement in opposition to appellants' statement as to jurisdiction. Appellee also files this its motion to dismiss the appeal, or in the alternative to affirm the judgment of the court below on the ground that the questions raised by appellants are unsubstantial.

While the cause is one which would otherwise be reviewable by the Supreme Court on direct appeal, appellee asserts that the unsubstantial character of the grounds stated by appellants is so apparent as to warrant this court in summarily disposing of this appeal without further hearing. Appellee further shows that the judgment of the court below must, in any event, be affirmed upon the findings of that court as to the confiscatory character of the order of Alabama Public Service Commission sought to be enforced by appellants, but enjoined by the court below.

I

Statement of the Issues on Appeal

Only procedural questions are raised in this appeal by appellants. Appellants have not raised any issue as to the correctness of the decision of the court below on the merits or facts in its holding that the contested order of Alabama Public Service Commission was confiscatory and unconstitutional.

The procedural and only issues involved in this appeal are:

(a) Since the complaint prayed for an interlocutory and permanent injunction to restrain the confiscatory and unconstitutional order of Alabama Public Service Commission under an Alabama statute, was a 3-judge court the proper tribunal to hear and decide the case?

(b) Since confiscation of plaintiff's property by the order of Alabama Public Service Commission was alleged and proved, should the 3-judge Federal Court surrender its jurisdiction to state courts where no speedy, plain, and efficient remedy was afforded therein?

(c) Where all material facts showing that the order of Alabama Public Service Commission was confiscatory and unconstitutional were proved, should the

Federal Court abandon or decline jurisdiction because in moulding its decree against the enforcement of such confiscatory and unconstitutional order, incidental relief was granted by enjoining the enforcement of state penalty statutes which would otherwise be applicable to plaintiff-appellee upon its failure or refusal to comply with such order?

(d) Is a proceeding to protect rights guaranteed by the Constitution of the United States from the impact of a confiscatory order of Alabama Public Service Commission a suit against the State of Alabama?

II

Statement of Facts

The facts leading to this litigation are as follows:

For many years, Louisville and Nashville Railroad Company, plaintiff-appellee, has operated passenger trains Nos. 64 and 65 between Selma, Alabama, and Flomaton, Alabama, entirely within the State of Alabama. In recent years, the operation of these trains has resulted in increasingly large losses because of the competition of other forms of transportation, particularly that of buses and privately owned motor vehicles. L & N could not discontinue trains 64 and 65 until it received authority from Alabama Public Service Commission, as required by Title 48, Sections 35 and 106, Alabama Code of 1940 (see appendix). If it had discontinued such service without authority, L & N and its officers would be subject to the heavy penalties provided by the applicable Alabama statutes (see appendix).

On December 15, 1949, L & N filed its application with Alabama Public Service Commission for authority to discontinue these trains in order to eliminate the very heavy losses involved in their operation. After a delay of over three months, the Alabama Commission set the case for hearing on the merits on March 22, 1950. Petitioner intro-

duced evidence in proof of its case, and the Commission took the case for an order. Under the law of Alabama (Title 48, Sec. 77 Code of Alabama 1940; see appendix), the Alabama Commission is required to decide all cases submitted to it within 90 days from submission, provided that it can extend the time for decision an additional 90 days "for good cause shown." In spite of the delay that had already occurred, and in spite of the heavy losses involved, the Commission extended the time for decision an additional 90 days, which expired on September 20, 1950. Appellee requested immediate action on several occasions, but the Commission did not decide the case until October 14, 1950, when appellee received the order, although the order was back dated to September 20, 1950. The Commission decided the case on the merits, and denied appellee permission to discontinue the trains. The loss, as found by the 3-judge court was $6,000.00 per month, so that the delay of the Commission in deciding the case cost appellee around $60,000.00, which loss is irreparable, and which, under the Commission's order, must continue; hence the urgent need for immediate relief by injunction from the 3-judge Federal Court.

Having futilely pursued its "administrative remedies" for 10 months without relief, appellee then sought relief by filing its complaint in the Federal Court praying for an interlocutory and permanent injunction, on the ground that the order of the Alabama Commission required the continued operation of these passenger trains, violated the 14th Amendment of the Constitution of the United States by taking its property without due process of law, by confiscating its property without just compensation; and violated Article 1, Section 8, of the Constitution of the United States by imposing an unreasonable burden on interstate commerce and on interstate freight and passenger rates.

Incidental and ancillary to the primary relief of enjoining the Alabama Commission's order requiring the continued operation of these passenger trains, appellee sought also to enjoin the Commission and the Attorney General of Alabama from enforcing the heavy penalties and sanctions provided by the statutes of Alabama (see appendix) for failure to comply with orders of Alabama Public Service Commission.

By the provisions of 28 U. S. C. A., Sections 2281 and 2284 (see appendix) and the unbroken line of decisions construing these sections, a proceeding to set aside or enjoin the enforcement of an order of a state administrative board or commission, as violative of the United States Constitution, requires the more solemn statutory 3-judge court as distinguished from the District Judge sitting alone. Such court was convened, and by stipulation of the parties the case was submitted on the merits for final decree and injunction as well as on the prayer for an interlocutory injunction. After hearing and considering the evidence, the 3-judge court held the Alabama Commission's order to be confiscatory and unconstitutional, and enjoined defendants from enforcing it or any penalties or sanctions against the railroad because of the discontinuance of the two passenger trains involved.

Appellants seek to contend that the 3-judge court erred in not considering the effect of the losses from these passenger trains on the operation of the system as a whole, but such effort is abortive. The 3-judge court did consider this and found the losses "burdensome" and appellants did not appeal from, and therefore cannot review, this or any other finding of fact.

The Court in its findings, opinion, and order held that the order of the Commission was illegal and confiscatory and deprived L & N of its rights guaranteed by the United

States Constitution. No appeal has been taken from that finding. This case is reported in 94 F. Supp., 893.

III

No Substantial Federal Question Is Presented

Appellants at the outset question the jurisdiction of the 3-judge District Court, on the theory that since appellee did not attack the constitutionality of a state "statute", but instead attacked the constitutionality of the "order" of Alabama Public Service Commission requiring the continued operation of Trains 64 and 65, there was no jurisdiction in the 3-judge court pursuant to section 2281, Title 28, U. S. C. (See appendix).

Section 2281 was formerly section 380 of Title 28, U. S. C., or section 266 of the Judicial Code.

This feigned issue was decided against the State's contention in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S., 290, 292, 67 L. Ed. 659, 661 (1923), in the clearcut opinion written by Mr. Justice Holmes for a unanimous court:

> "A doubt has been suggested whether these cases are within Section 266 of the Judicial Code, Act of March 3, 1911, chap. 230, 36 Stat. at L. 1086, 1162, as amended by the Act of March 4, 1913, chap. 160, 37 Stat. at L. 1013, Comp. Stat. section 1243, 5 Fed. Stat. Anno. 2d ed. p. 984. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state'; but did not change the statement of the ground, which still reads, 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the

unconstitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. Louisville & N. R. Co. v. Finn, 235 U. S. 601, 604, 59 L. Ed. 379, 382, P. U. R. 1915A, 121, 35 Sup. Ct. Rep. 146; Phoenix R. Co. v. Geary, 239 U. S. 277, 280, 281, 60 L. Ed. 287-289, 36 Sup. Ct. Rep. 45; Cumberland Teleph. & Teleg. Co. v. Louisiana Pub. Serv. Commission, November 20, 1922 (260 U. S. 212, ante 217, 43 Sup. Ct. Rep. 75); Western & A. R. Co. v. Railroad Commission, February 19, 1923 (261 U. S., 264, ante, 645, 43 Sup. Ct. Rep. 252). The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 301, 318, 58 L. Ed. 229, 238, 244, 34 Sup. Ct. Rep. 48; Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 555, 58 L. Ed. 721, 725, 34 Sup. Ct. Rep. 364; Grand Trunk Western R. Co. v. Railroad Commission, 221 U. S. 400, 403, 55 L. Ed. 786, 787, 31 Sup. Ct. Rep. 537. But it plainly was intended to enlarge, not to restrict, the law. We mention the matter simply to put doubts to rest."

Other railroads, similarly situated, have applied for and received identical relief from 3-judge Federal courts convened in various states and jurisdictions in the following cases:

Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 (D. C., E. D. Michigan, July 6, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission*, 91 F. Supp. 980 (D. C., M. D. Alabama, July 20, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission*, 88 F. Supp. 441 (D. C., M. D. Alabama, Feb. 8, 1950);

Chicago, B. & Q. R. Co. v. *Board of Railroad Commissioners of Montana*, 78 F. Supp. 1010 (D. C. Montana 1947);

Atlantic Coast Line R. R. Co. v. *Public Service Commission of South Carolina*, 77 F. Supp., 675 (D. C., E. D. South Carolina 1948);

Northern Pacific Ry. Co. v. *Board of Railroad Commissioners of Montana*, 46 F. Supp. 340 (D. C. Montana 1942);

Great Northern Ry. Co. v. *Nagle*, 16 F. Supp. 532 (D. C. Montana 1936);

Delaware, L. & W. R. Co. v. *Van Santvoord et al.*, 232 F. 978 (D. C., N. D. New York 1916);

Mississippi Railroad Commission v. *Mobile & O. R. Co.*, 244 U. S., 388, 61 L. Ed. 1216 (1917);

Atlantic Coast Line R. R. Co. v. *Ala. Public Service Commission*, 92 F. Supp. 579 (D. C., M. D. Alabama, Aug. 23, 1950);

Louisville & N. R. Co. v. *Ala. Public Service Commission*, 93 F. Supp. 544 (D. C., M. D. Ala. 1950);

Louisville & N. R. Co. v. *Ala. Public Service Comsion*, 94 F. Supp. 892 (D. C., M. D. Ala. 1950);

Atlantic Coast Line R. R. Co. v. *Fla. R. R. & P. U. Commission*, (D. C. N. D. Fla. March 19, 1951; Case No. 302 Civ. T.).

Obviously these courts were unanimous in their opinion that a 3-judge Federal court had jurisdiction, since in none of those cases was there any dissenting opinion or any hint of doubt that such jurisdiction existed.

Other cases in which the United States Supreme Court held proper the convening of a 3-judge Federal court to enjoin an order of a state administrative board or commission, following Mr. Justice Holmes in the *Oklahoma Natural Gas* case, are:

Sterling v. Constantin, 287 U. S. 378, 77 L. Ed. 375 (1932);

Herkness v. Irion, 278 U. S. 92, 73 L. Ed. 198 (1928);

Driscoll v. Edison Lt. & Pr. Co., 307 U. S. 104, 83 L. Ed. 1134 (1938);
Corporation Commission of Oklahoma v. Cary, 296 U. S. 452, 80 L. Ed. 324 (1935);
Mountain States Power Co. v. Public Service Commission, 299 U. S. 167, 81 L. Ed. 99 (1936).

The order of the Alabama Commission sought to be enjoined by appellee was found and held by the court below to be confiscatory and violative of the 14th Amendment of the Federal Constitution. Appellee had suffered such confiscation, awaiting the hearing of its petition to discontinue these trains and the Commission's delayed decision. It was entitled to a plain, speedy, and efficient remedy to relieve it from further confiscation.

> "Present confiscation is not atoned for by merely holding out the hope of a better life to come."
> Mr. Justice Cardozo in West Ohio Gas Co. v. P. U. Comm. of Ohio, 294 U. S. 79, 83, 79 L. Ed. 773, 777.

It sought and obtained such relief in a Federal Court. In this appeal, the Alabama Commission has not challenged the correctness of the decision of the court below on the merits and the facts of the case that, under the evidence, the order of the Alabama Commission was confiscatory and illegal. Certainly appellants cannot contend that its order challenged and complained of in the court below "had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property, and unreviewable through the judicial power of the Federal Government. If this extreme position could be deemed to be well taken, it is manifest that the fiat of [Alabama Public Service Commission], and not the Constitution of the United States, would be the supreme law of the land".—Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. C. 378, 397, 77 L. Ed. 375, 385.

Undoubtedly, this was a case for a 3-judge court. Even if we were to assume that the 3-judge court did not have jurisdiction over the case, the proceedings before it and its order and judgment would not be void, and the Supreme Court would not order the case dismissed, but would simply reverse and remand the case for an order by the single judge of the District Court below.—*Phillips* v. *U. S.*, 312 U. S. 246, 85 L. Ed. 800 (1941). That Judge was a member of the 3-judge court, and it was he who wrote the opinion of that court in this case. Obviously, he would reach the same conclusion if he were deciding the case alone. Therefore, what does it profit the Alabama Commission to appeal solely from the procedure—not complaining of or attacking the correctness of the decision of the court below on the merits and facts of the case—other than further delay? If appellants contend that this case was one for decision by a single District Judge sitting as a District Court, rather than one for a 3-judge court, then obviously the same result or decision would be reached. If appellants contend that even a single District Judge sitting as a District Court had no jurisdiction over the case, then the entire system of concurrent Federal jurisdiction over violations of the Federal Constitution would cease.

Appellants next contend that the Federal Court should have declined to exercise jurisdiction in this case for reasons of comity.

> "Rules of comity or convenience must give way to constitutional rights. • • •
>
> "*As in our opinion the District Court had jurisdiction and a duty to try the question* whether a preliminary injunction should issue, and as that question has not yet been considered, the cases should be remanded to that court, with directions to proceed to the trial." [Emphasis supplied.]
>
> Mr. Justice Holmes in Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 293, 67 L. Ed. 659, 662.

Other cases holding that the Federal Court properly exercises jurisdiction in cases involving confiscation and Federal constitutional questions are:

Corporation Commission of Oklahoma v. Cary, 296 U. S. 452, 80 L. Ed. 324 (1935);
Mountain States Power Co. v. Public Service Comm. of Montana, 299 U. S. 167, 81 L. Ed. 99 (1936).

Section 2284(5) of Title 28, U. S. C., furnishes the test of when proceedings in the Federal Court should be stayed, namely, when like proceedings are pending in a state court having jurisdiction thereover. Here, no such proceedings were or are pending in the State courts of Alabama.

Appellants rely heavily on those cases where the Federal courts, in the exercise of their discretion, have abstained from interfering with a state's policy of conserving its own natural resources, as for example the oil proration case of *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424. These cases are *sui generis* and have no application here.

There has been no authoritative declaration by the courts of Alabama that appellee has the right to supersede an order of the Alabama Public Service Commission in a train discontinuance case under the provisions of Title 48, Section 84 (see appendix), and no statement or admission to that effect by the Attorney General of Alabama can in any way bind the courts of Alabama. Thus it cannot be said that appellee's remedies in the state court are "plain" or "efficient". Appellee sought relief from the state administrative body for ten months without avail. It sought and obtained relief from the Federal District Court in approximately 55 days. No further comment need be made as to whether state remedies are as "speedy" as Federal in this case. The time for taking an appeal in the state court has expired, so that remedy, so strongly

argued by appellants, is non-existent and hence irrelevant. Furthermore, where confiscation is alleged and proved under the Federal Constitution, nothing can preclude the jurisdiction of Federal Court thereover.

The allegations of appellee in its complaint, and the findings and decision of the court below that the order of the Alabama Commission was confiscatory and unconstitutional are unchallenged in this appeal. Thus the contention of appellants that the court below should decline to exercise jurisdiction because of "complicated questions of fact" is entirely without merit. There is no novel question of state law or state policy involved in this case. There was and is involved in it the question of confiscation under the Federal Constitution. As to the policy of the State, that was decided in *Alabama Public Serv. Comm.* v. *A.C.L.R. Co.*, 45 So. (2d) 449, 451 (Ala. Sup. Ct. March, 1950), where the Court said:

> "There is no other railroad service in that area. There is a good hard surface road and bus service for passengers in all directions, with one truck freight common carrier. *The passenger patronage would not demand a continuance of the railroad service.*" [Emphasis supplied.]

This case is the sixth of a series of like cases in which the Alabama Commission has arbitrarily and unconstitutionally ordered railroads to continue unprofitable passenger service in spite of the policy laid down by the Alabama Supreme Court; and in all of them such orders have been enjoined by a 3-judge court. The Alabama Commission, by its order in this case, has ignored the pronouncement of the Alabama Supreme Court and the decisions of the 3-judge courts, and it now asks the Supreme Court to make the order of the Alabama Commission, even though confiscatory, supreme by surrendering jurisdiction.

As to enjoining penalties or sanctions: Appellants complain that the court below enjoined them from undertaking to apply any penalties or sanctions against appellee for its failure or refusal to continue the operation of the trains in question. In fact, appellants contend that a Federal Court has no right to enjoin the enforcement of a state criminal law. Such is not an issue here, nor is it involved. The relief sought by appellee's complaint, and the real relief granted by the 3-judge court below, was against confiscation of appellee's property, which would have resulted from requiring the continued operation of trains with such heavy financial losses. The court below found and decided that appellee was entitled to relief, and accordingly enjoined the enforcement of the order of the Alabama Commission. Obviously such relief would be ineffectual if appellee, or its representatives, could be harassed by penalties or prosecutions under any penalty statutes of Alabama for failure to comply with the Alabama Commission's order, which order the court below had set aside and held to be illegal and confiscatory. By this action, the court below made its decree effective.

Clearly this action comes under the well defined exception established by this Court in the case of *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451, 71 L. Ed. 1146, 1150 (1927):

> "• • • But an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate (citing other U. S. Supreme Court cases)."

A similar holding is *Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 49, 85 L. Ed. 577, 579 (1941). See also *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 79 L. Ed. 1322 (1935).

Finally, and apparently as an afterthought, appellants here for the first time argue that this proceeding is a suit against the State of Alabama. That such contention is patently without merit is expressly held in *Ex parte Young*, 209 U. S. 123, 52 L. Ed. 714.

Appellee further submits that questions presented in this appeal have been so definitely determined by decisions of the Supreme Court, following which so many 3-judge courts have assumed jurisdiction over like cases, that no substantial Federal question is presented by this appeal which would entitle appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee respectfully moves that this appeal be dismissed, or that the judgment and decree of the Court below be affirmed.

Respectfully Submitted,

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APPENDIX

ALABAMA STATUTES

All citations are to the Code of Alabama of 1940

Abandonment of Service:

Title 48, section 35.

"No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application, and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate."

Title 48, section 106.

"No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuance of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment."

Time for Decision:

Title 48, section 77.

"The commission shall within ninety days after the completion of the hearings and arguments, if any, and the filing of briefs, if any, in any case submitted to it, or upon a rehearing thereof, decide said cause, or if for any good and valid reason it shall be unable to decide the same within said

period, then at the expiration of said ninety day period, the commission shall make and file and serve upon all the interested parties a written order stating its reasons for its inability to decide said cause within said time, and may extend the time for decision for a period not to exceed ninety days."

Penalty Statutes:

Title 48, section 78.

"In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein."

Title 48, section 163.

"Every violation of the provisions of this chapter, or of any order, decision, rule, regulation, direction, or requirement of the commission, or any part or portion thereof, by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission, or failure of any officer, agent, or employee of any transportation company acting within the scope of his official duties or employment shall in every case be deemed to be the act, omission or failure of such transportation company."

Title 48, section 399.

"Any utility doing business in this state, or any of its authorized agents, officers, or employees, who is guilty of

knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense."

Title 48, section 400.

"Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

Supersedeas:

Title 48, section 84.

"No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to grant such rates, fares or charges, or any of them,

or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided."

UNITED STATES STATUTES

U. S. Code, Title 28, section 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

U. S. Code, Title 28, section 2284:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders,

at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such

statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

PER

CURIAM

MR. JUSTICE JACKSON adhere to the views expressed in their concurring opinion in *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341, 351, as to the jurisdictional issue in these cases. *Si Garrett*, Attorney General of Alabama, *M. Roland Nachman, Jr.* and *Wallace L. Johnson*, Assistant Attorneys General, for appellants. *Robert E. Steiner, Jr.* and *Sam Rice Baker* for appellee. Reported below: 94 F. Supp. 892, 893.

No. 99. THORP v. BOARD OF TRUSTEES, NEWARK COL-

Nos. 89 and 90. ALABAMA PUBLIC SERVICE COMMISSION ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. Appeals from the United States District Court for the Middle District of Alabama. *Per Curiam:* Judgments reversed. *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341. MR. JUSTICE FRANKFURTER and